IN THE COURT OF APPEALS OF IOWA

No. 0-647 / 10-0502
Filed November 24, 2010

THE WALDINGER CORPORATION and EMCASCO INSURANCE COMPANY, and SECOND INJURY FUND OF IOWA,
Petitioners-Appellants,

vs.

MICHAEL B. METTLER,
Defendant-Appellee.

Appeal from the Iowa District Court for Polk County, Artis Reis, Judge.

The petitioners appeal from the district court order on judicial review, affirming the agency's grant of workers' compensation benefits to Mettler and remanding to the agency for recalculation of his industrial disability. **AFFIRMED IN PART AND REVERSED IN PART.**

D. Brian Scieszinski of Bradshaw, Fowler, Proctor & Fairgrave, P.C., Des Moines, for appellant The Waldinger Corporation.

Thomas J. Miller, Attorney General, and Deborah M. Stein, Assistant Attorney General, for appellant Second Injury Fund.

Harry W. Dahl, Des Moines, for appellee.

Heard by Mansfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Today we are asked to decide two related workers' compensation appeals involving injured worker Michael Mettler. The first is his employer's challenge to the refusal by the workers' compensation commissioner to apportion Mettler's preexisting impairment as determined by the Veteran's Administration (VA) and the commissioner's grant of healing period benefits after Mettler had achieved maximum medical recovery. The second is the Second Injury Fund's appeal of the district court's remand for the agency to recalculate the percentage of Mettler's industrial disability. Because we find substantial evidence to support the commissioner's decision on the apportionment and industrial disability claims, we affirm the district court's rejection of apportionment, but reverse the district court's remand of the industrial disability calculation. We also reverse on the healing period benefit issue, finding it is controlled by precedent from our supreme court.

I. Background Facts and Procedures

Michael Mettler was a plumber by trade. He graduated from high school in 1969 and completed a five-year training and apprenticeship program to become a journeyman plumber and pipefitter in 1974. He worked for several years as a union plumber. In 1979 he joined the army reserves and began active military duty in 1981. His service continued until 2001 when he was honorably discharged. Mettler performed a variety of duties while enlisted, including construction, recruitment, truck driving, guidance counseling, logistics operations,

radio communications, and supply. Mettler also received training as an airborne paratrooper and jumped from airplanes more than forty times during his service.

In 1989, Mettler was working as a supply sergeant and fell from a step ladder while moving boxes. He landed on both elbows, breaking the bones and requiring separate surgeries on each elbow to remove bone spur chips. In 1991 or 1992, Mettler sprained his ankle while parachuting and walking on rough terrain. In the 1990s, Mettler had several surgeries to repair a recurrent umbilical hernia. He also received treatment for lower back pain during the late 1990s. Mettler's doctors restricted him to lifting no more than twenty-five pounds and he spent his last ten years of military service on a desk job that was not physically demanding. While he was in the military, Mettler took courses toward the completion of his college degree.

In May 2001, Mettler resumed his work as a plumber, starting a position with The Waldinger Corporation (Waldinger). Shortly before starting this employment, Mettler underwent a disability examination at the VA. The VA determined that he had twenty percent impairment to his right ankle and ten percent impairment to his right knee. Considering impairment to his spine and his tinnitus symptoms, the VA calculated his total impairment at seventy percent. As a result of this disability determination, Mettler receives $1100 a month from the VA.

Mettler testified that he was able to perform his assigned duties when he started at Waldinger. As time went on, he noticed increased pain in his ankle when climbing ladders and walking on uneven surfaces. The parties stipulated

that Mettler received a work-related injury on August 9, 2001. Mettler saw a series of doctors during late 2001; he eventually received a diagnosis of talar dome lesion, which is an injury to the ankle joint. On February 6, 2002, Mettler had the first of four surgeries on his ankle. The dates for the subsequent surgeries were September 25, 2002; July 1, 2004; and September 28, 2007. He ended his employment at Waldinger in 2006; he worked briefly for two other plumbing companies before changing careers. As a full-time plumber, Mettler earned approximately $50,000 per year.

In early 2007, Mettler finished his bachelor's degree and obtained the credentials necessary to teach high school industrial arts. In the spring of 2008, he signed a nine-month contract with the Indianola Community School District to start teaching the 2008 fall semester at a salary of $33,700.

Mettler filed petitions against Waldinger and the Second Injury Fund (the Fund) seeking workers' compensation benefits. At the time of the August 18, 2008 hearing before the deputy workers' compensation commissioner, Mettler was fifty-seven years old.

The deputy workers' compensation commissioner filed an arbitration decision on September 23, 2008, awarding Mettler fifteen percent partial disability for his lower right extremity, based on the opinion of Dr. Michael Lee, following Mettler's 2007 ankle surgery. The decision did not apportion a preexisting impairment based on Mettler's examination by VA doctors before he started his employment with Waldinger, opining it was "unclear how the 'disability' for Veterans Affairs benefits was determined."

The arbitration decision declined Mettler's request for healing period benefits, a form of temporary compensation that precedes the allowance of permanent partial disability benefits. The decision noted that under Iowa Code section 85.34(1) (2001), the employer is to pay healing period benefits until the employee returns to work or reaches maximum medical improvement. The arbitration decision found Mettler returned to work before September 18, 2007, and reached maximum medical improvement on April 6, 2005.

The deputy commissioner also awarded a fifteen percent industrial disability against the Fund as a result of the combined effects of the losses to his right and left arms and his right ankle and leg. The arbitration decision considered a host of factors, including the injured worker's age, education, qualifications, experience, motivation, loss of earnings, severity and sight of the injury, work restrictions, and the worker's ability to engage in employment for which he is qualified, and the employer's offer of work. The decision also compared Mettler's $4000 monthly salary as a plumber to his teaching contract monthly salary of $3745 and concluded that his various disabilities "do not appear to have diminished in any way his earning capacity."

Both Mettler and Waldinger appealed from the arbitration decision. The appeal decision issued by the agency on July 21, 2009, affirmed the arbitration decision in all aspects except one. The appeal decision awarded Mettler healing period benefits from his last surgery on September 18, 2007, through December 17, 2007.

Waldinger petitioned for judicial review on July 28, 2009. The district court affirmed the agency's determination that Waldinger was responsible for the full amount of compensation for Mettler's right lower extremity disability of fifteen percent. The court determined the evidence was not sufficient to establish that the preexisting condition independently produced a discrete and ascertainable degree of disability, for the purpose of apportionment under Iowa law. The district court also affirmed the appeal decision's award of healing period benefits for the time period following the September 2007 surgery. The court opined: "A single injury may produce multiple periods of time when healing period compensation is payable."

The district court disagreed with the agency's method of calculating Mettler's loss of earnings by comparing his monthly salary as a plumber with his monthly salary as a teacher, which "ignor[ed] the fact that he receives no earnings during the other three months of the year." The district court remanded the case to the agency to "reassess the amount of Mettler's industrial disability based on an actual loss of earnings of 30% so as to more accurately reflect the lost earnings and loss of access to the job market." Waldinger and the Fund both appeal from the district court's decision.

II. Standard of Review

We review decisions of the workers' compensation commissioner according to Iowa Code chapter 17A. *Swiss Colony, Inc. v. Deutmeyer*, 789 N.W.2d 129, 133 (Iowa 2010). When the question is the meaning of a statute, the commissioner's interpretation receives no deference; we are free to

substitute our interpretation de novo. Iowa Code § 17A.19(10)(*c*); *Swiss Colony, Inc.,* 789 N.W.2d at 133.

We review an agency's factual findings for substantial evidence, which is defined as the quantity and quality of evidence deemed sufficient to establish the fact at issue for a neutral, detached, and reasonable person understanding the establishment of the fact to be serious and of great importance. Iowa Code § 17A.19(10)(*f*). The evidence is not insubstantial merely because a court could draw a different conclusion from the record. The question is whether the record viewed as a whole supports the agency's finding. *Swiss Colony*, 789 N.W.2d at 133-34.

Our workers' compensation statute is to be liberally construed to implement its remedial purposes. *Kohlhaas v. Hog Slat, Inc.,* 777 N.W.2d 387, 394 (Iowa 2009).

III. Discussion

A. Apportionment of Preexisting Impairment

An employer must take full responsibility for compensating a work-place injury which aggravates a preexisting condition. *Floyd v. Quaker Oats*, 646 N.W.2d 105, 110 (Iowa 2002). Apportionment is only proper when a preexisting injury has produced a discrete and ascertainable degree of disability.[1] *Id*. In

[1] Presently, Iowa Code section 85.34(7) governs the apportionment of benefits. Section 85.34(7) became effective September 7, 2004, and applies to injuries occurring on or after its effective date. *See Drake Univ. v. Davis,* 769 N.W.2d 176, 184 (Iowa 2009). Because Mettler's injuries occurred before the effective date, section 85.34(7) does not apply to this case.

other words, the employer must show a particular percentage of the permanent disability would have resulted from the prior event standing alone. *Id*.

Waldinger contends that it should not be held responsible for Mettler's entire fifteen percent permanent disability stemming from his August 9, 2001 ankle injury. Waldinger asserts that the agency should have apportioned out Mettler's preexisting impairment as determined by his VA disability evaluation completed shortly before he started working for the company in May 2001. The VA determined Mettler had twenty-percent impairment to his right ankle.

Mettler argues in response that the agency correctly ruled that it was "unclear" how the VA determined its disability benefits and that without more information it would not consider the preexisting impairment a "functional loss" for the purposes of Iowa workers' compensation benefits. He asserts that the agency record supports the finding he was able to perform his plumbing duties at Waldinger until the injury to his ankle in August 2001.

Waldinger is not entitled to apportionment unless Mettler's preexisting ankle injury produced a discrete and ascertainable degree of disability. The employer failed to show that a particular percentage of the permanent disability would have resulted from injuries sustained during Mettler's military service standing alone. The record developed before the agency does not offer any information about how the VA measured Mettler's level of disability or what the VA's assigned disability percentages signify in terms of his ability to perform his duties at Waldinger. In facing a similar apportionment question, the state supreme court from another jurisdiction opined the following: "We have no doubt

that disability compensation voluntarily bestowed by the government upon veterans who have suffered injuries as a result of military service does not fix a compensation carrier's legal liability upon its workmen's compensation insurance contracts." *See Snead v. Adams Constr. Co*., 380 P.2d 836, 838 (N.M. 1963) (noting Veteran's Bureau ratings were made for a different purpose and under different standards than those in workers' compensation cases). In the absence of evidence in this record to explain the VA assessment, we do not find that it compels apportionment in this case.

Apportionment must be considered in light of the rule that employers take employees as they find them. *Bearce v. FMC Corp.*, 465 N.W.2d 531, 536 (Iowa 1991). When Waldinger hired Mettler in May 2001, it took him subject to any active or dormant impairments incurred during his military service. The agency record supports a finding that Mettler may have had a preexisting condition, but not a preexisting disability. The agency noted Mettler's testimony that he did what was necessary to satisfy his employer and only developed foot pain after beginning work at Waldinger. The medical evidence did not point to an ascertainable degree of disability stemming from preexisting injuries. In a letter dated January 24, 2002, Dr. Michael Lee wrote to Waldinger that it was difficult to detect exactly how the talar dome lesion occurred, but it was asymptomatic during Mettler's military tenure. Dr. Lee was unable to state with medical certainty that the injury occurred while Mettler was employed at Waldinger, but was "comfortable" in suggesting that it was the direct result of Mettler's current employment. The deputy workers' compensation commissioner correctly held

Waldinger responsible for the aggravation of any preexisting ankle condition Mettler may have developed during his military service. We affirm on this issue.

B. Healing Period Benefits

Healing period benefits are covered by Iowa Code section 85.34(1), which provides that the employer shall pay an employee compensation for a healing period beginning on the date of the injury and continuing until the first to occur of three events: (1) the employee has returned to work; (2) the employee has achieved maximum medical recovery; or (3) the employee is capable of returning to substantially similar employment. *See Ellingson v. Fleetguard, Inc*., 599 N.W.2d 440, 447 (Iowa 1999). Waldinger contends that under *Ellingson,* Mettler was not entitled to healing period benefits following his fourth surgery on September 28, 2007. Waldinger reasons that two of the triggering events from section 85.34(1) occurred before September 28, 2007. First, Mettler reached maximum medical improvement on August 6, 2005, according to both Dr. Lee and Dr. John Kuhnlien. Second, Mettler returned to his work as a plumber before the fourth surgery. The deputy commission took this same position in the arbitration decision, finding Mettler did not prove his eligibility for healing period benefits after September 28, 2007.

In the appeal decision, the agency reversed on this issue, awarding Mettler healing period benefits from September 28, 2007, to December 17, 2007. The appeal decision asserted that "a healing period may be intermittent" and an employee may be compensated for a healing period that occurs after it was believed that the employee had received maximum medical recovery if the

employee receives additional treatment in anticipation of reasonable improvement. The district court adopted the appeal decision's legal reasoning.

Mettler asserts that all the symptoms leading up to his 2007 ankle arthroscopy surgery were a continuation of his 2001 work injury and, therefore, the 2007 surgery was a continuation of his treatment for the work injury. Although that assertion may be true, it does not establish that Mettler was entitled to healing benefits after two doctors agreed that in 2005 he had reached maximum medical recovery for the original injury. Dr. Lee saw Mettler on April 6, 2005, and wrote to Waldinger that same day expressing the opinion Mettler was at maximum medical improvement. Dr. Lee rated Mettler's foot disability at ten percent. Dr. Kuhnlein saw Mettler on September 20, 2005, and reviewed his medical history. This doctor also opined that Mettler was at maximum medical improvement and rated his impairment as 13 percent of the lower extremity. Our court has defined the point of maximum recuperation as "that condition in which healing is complete and the extent of the disability can be determined." *Armstrong Tire & Rubber v. Kubli*, 312 N.W.2d 60, 65 (Iowa Ct. App. 1981). Mettler presents no countervailing evidence to show the doctors were mistaken in determining he had reached the point of maximum improvement in April 2005. *See Thomas v. William Knudson & Son, Inc.*, 349 N.W.2d 124, 126 (Iowa Ct. App. 1984) (noting that healing benefits are awarded an injured worker until the point at which a disability can be determined).

Mettler was experiencing right ankle swelling and pain in the summer of 2007. He asked Dr. Lee about ankle replacement surgery, but the doctor did not

believe such an involved procedure was "indicated for him." Instead, Dr. Lee recommended arthroscopy followed by lubricant injections. Dr. Lee performed the surgery on September 18, 2007. At a post-operative appointment, Dr. Lee told Mettler that physical labor was too hard on his ankle and he would be better served by working a desk job. This evidence does not support a finding that doctors anticipated reasonable improvement from the additional treatment.

In *Ellingson*, the injured worker argued that a healing period can commence and end, only to have another healing period commence when there is a retrogression in a worker's disability. 599 N.W.2d at 447. Our supreme court held that Ellingson's argument concerning recommencement of the healing period has application, if at all, only to situations where the healing-period benefits have been terminated based on the employee's return to work prior to attaining maximum improvement of the injury. *Id*. Where significant improvement is not anticipated, all benefits are finally terminated. *Id*. The *Ellingson* holding controls the question before us. Because Mettler attained maximum improvement to his ankle in 2005, the healing period did not recommence following his September 2007 surgery.

We disagree with the commissioner's decision that Mettler was entitled to healing period benefits from September 18, 2007, until December 17, 2007, which was upheld by the district court. We reverse the district court on this point.

C. Industrial Disability Calculation

"Industrial disability measures an employee's lost earning capacity." *Keystone Nursing Care Ctr. v. Craddock*, 705 N.W.2d 299, 306 (Iowa 2005). The

agency must consider several factors in calculating the percentage of loss, including the employee's functional impairment, age, education, intelligence, work experience, qualifications, ability to engage in similar employment, and adaptability to retraining. *Id*. A comparison of the worker's actual earnings before and after the injury is significant to the calculation, but it is not determinative. *Id*.

The commissioner considered all the relevant factors outlined in *Keystone* and pegged Mettler's industrial disability at fifteen percent. The commissioner found that Mettler demonstrated his capacity for performing work outside the field of plumbing and not involving manual labor by his ten years at a desk job in the military and by obtaining his college degree and a teaching contract. The commissioner determined that Mettler's disabilities—other than his elbows and ankles—did not significantly diminish his earning capacity. We believe the agency's factual finding is supported by substantial evidence.

In reaching its conclusion, the commissioner compared Mettler's monthly income of $4000 as a plumber to his $3745 monthly income as a teacher. The comparison of Mettler's monthly income rather than his annual income troubled the district court. The court concluded that the agency's comparison of the monthly wages received by Mettler in his pre-injury and post-injury employment was faulty because his teacher contract was for nine months and he had no other income for the summer months. The district court calculated a thirty-percent difference between $50,000, the annual salary Mettler earned as a plumber, and $33,700, the annual salary he would earn as a teacher. The district court

remanded the case to the agency for a recalculation of the industrial disability, based on a comparison of his pre-injury and post-injury salaries on an annual rather than monthly basis.

The Fund challenges the district court's decision to remand the case to the agency for a reassessment of the amount of industrial disability. It argues that substantial evidence supports the commissioner's finding that Mettler's industrial disability was fifteen percent. It urges that a comparison of actual earnings is but one factor to consider—albeit an important factor. The Fund also asserts the district court should not have speculated that Mettler would not find a summer job to supplement his teacher's salary.

We do not decide whether it would be more accurate to compare Mettler's monthly or annual salaries. The record is limited on the question of his actual earnings because at the time of the hearing Mettler had yet to start his first semester of teaching under the contract. No evidence was available whether he would or could earn an equivalent salary during the non-contract months of summer. But the commissioner recited in the factual findings that Mettler's new annual salary would be "$3,745 for each of 9 months or $2,808.75 for each of 12 months." The commissioner did not reach its determination of Mettler's industrial disability based on an erroneous factual finding.

Furthermore, the commissioner carefully weighed all of the pertinent factors in determining Mettler's lost earning capacity. The agency's method of computing actual earnings does not detract from the substantial evidence supporting its final determination. The parties acknowledged at oral argument

that if the matter were remanded for a new calculation—based in part on the district court's comparison of Mettler's annual salary as a plumber with his annual salary as a teacher—the agency could well reach the same overall industrial disability determination. Viewed as a whole, we believe the evidence supports the agency's finding of fifteen percent industrial disability. We reverse the district court's remand order.

AFFIRMED IN PART AND REVERSED IN PART.